

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

ETHAN P. DAVIS
Acting Assistant Attorney General
Civil Division
AUGUST E. FLENTJE
Special Counsel to the Assistant Attorney General
Civil Division
WILLIAM C. PEACHEY
Director, District Court Section
Office of Immigration Litigation
WILLIAM C. SILVIS
Assistant Director, District Court Section
Office of Immigration Litigation
SARAH B. FABIAN
NICOLE N. MURLEY
Senior Litigation Counsel
Tel: (202) 532-4824
Fax: (202) 305-7000
Email: Sarah.B.Fabian@usdoj.gov

Attorneys for Defendants

**UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA**

JENNY LISETTE FLORES; *et al.*,

Plaintiffs,

v.

WILLIAM P. BARR, Attorney
General of the United States; *et al.*,

Defendants.

Case No. CV 85-4544-DMG

**Defendants’ Objections to the
Independent Monitor’s “Interim
Report on the Use of Temporary
Housing for Minors and Families
under Title 42” (ECF No. 938)**

1 **I. INTRODUCTION**

2 Defendants object to the August 26, 2020 “Interim Report on the Use of
3 Temporary Housing for Minors and Families under Title 42” (ECF No. 938)
4 (“Interim Report”) filed by the Special Master/Independent Monitor (“Monitor”).
5 Specifically, Defendants object to the Interim Report because it recommends that
6 the Court require Defendants to take specific actions to comply with a standard
7 that is not found within the terms of the *Flores* Settlement Agreement
8 (“Agreement”), goes far beyond what the Agreement or any Court order
9 interpreting the Agreement has ever required, and is not based on any identified
10 violation of a substantive term of the Agreement. Defendants also object to the
11 Interim Report because it fails to comply with the procedures laid out in the order
12 appointing the Monitor (ECF No. 494) (“Monitoring Order”). The Court should
13 decline to consider the Interim Report or, if the Court intends to consider or adopt
14 any the factual representations or recommendations in the Interim Report in ruling
15 on Plaintiffs’ pending motion (ECF No. 920), the Court should follow the
16 procedures required by the Monitoring Order and Federal Rule of Civil Procedure
17 53(f) before doing so.

18 **II. BACKGROUND**

19 On October 5, 2018, this Court appointed the Monitor and detailed the scope
20 of her monitoring duties and authorities in the Monitoring Order. The Monitor is
21 tasked with monitoring compliance with certain orders of the Court, and
22 performing other related duties, and the Monitoring Order further provides that:

23 During the course of her monitoring duties, if the Monitor discovers
24 potential breaches of the Flores Agreement that are beyond the scope
25 of the June 27, 2017, July 27, 2018, or July 30, 2018 Orders, she shall
26 bring them to the Court’s and the Parties’ attention. The Court, in its
27 discretion, may authorize the Monitor to investigate the potential
28 breaches, request briefing from the Parties thereon, hold hearings or

1 mediation relating thereto, and issue a Report and Recommendation
2 thereon to the Court if the matter cannot be resolved through mediation.

3 Monitoring Order at 3-4. The Monitoring Order also provides for the filing of
4 regular reports by the Monitor, and for the possibility that the Monitor might file
5 an Interim Report and Recommendation, “if the Monitor has a good faith basis to
6 believe that there is a significant violation of the Court’s Orders that cannot
7 reasonably be addressed through a Report and Recommendation due to its
8 exigency.” *Id.* at 19-20. The Monitoring Order makes clear, however, that such an
9 Interim Report should include “any recommendations for steps necessary to
10 improve Defendants’ compliance and the reason for the urgency,” and that “[p]rior
11 to filing the Interim Report and Recommendation, the Monitor shall afford the
12 Parties a reasonable opportunity to be heard and to expeditiously cure any
13 violation.” *Id.* at 20. As part of the Monitoring Order, the Court also adopted and
14 incorporated the review provisions and timelines set forth in Federal Rule of Civil
15 Procedure 53(f).
16

17 On July 22, 2020, the Monitor filed an Interim Report on the Use of
18 Temporary Housing for Minors and Families Under Title 42. Notice, ECF No. 873
19 (“First Interim Report”). Defendants filed objections to the First Interim Report on
20 July 23, 2020, objecting that the Monitor had not been granted authority from the
21 Court to monitor the issue of minors held in hotels incident to the Title 42
22 processes, and that the parties were not provided any opportunity to be heard on
23 the issues raised in the First Interim Report, nor were Defendants provided the
24 opportunity to review the report or cure any violations prior to its being filed.
25 Objections, ECF No. 878, July 23, 2020. On July 25, the Court rejected
26 Defendants’ objections to the scope of the Monitor’s authority to monitor the use
27 of hotels in conjunction with the Title 42 processes, Order, ECF No. 887, at 3, but
28

1 did not address Defendants’ objections to the First Interim Report itself. On August
2 7, following a status conference with the parties, the Court reiterated that the
3 Monitor should “continue to monitor the hoteling of minors,” Order, ECF No. 912,
4 ¶ 6, but still made no determination on Defendants’ objections to the First Interim
5 Report. On August 26, after apparently conducting further monitoring, the Monitor
6 filed the Interim Report, but did not give Defendants a chance to review the report
7 prior to its filing or to cure or respond to any of the findings or recommendations
8 contained therein.

9
10 The Interim Report focuses primarily on data regarding the ages of minors
11 who are subject to the Title 42 processes and their lengths of stay in hotels. *See*
12 Interim Report at 5-14. The Interim Report contains a single paragraph noting—by
13 reference to the Declaration of Mellissa Harper, ECF No. 925-1—the amenities
14 available at the hotels where minors are housed. *Id.* at 15. It mentions in passing,
15 but does not address with any specificity, some of the evidence that Defendants
16 have provided regarding the custody and care of minors held briefly in these
17 circumstances. It does not explain why the amenities that Defendants have
18 detailed—including the availability of one-on-one care by specialists, beds,
19 showers, hygiene kits, food and drinks, clothing, medical care, and access to phone
20 calls—are insufficient to meet the Agreement’s requirements.

21 The report opines that “it seems clear that the Temporary Housing Program
22 [“THP”¹] is not fully responsive to the safe and sanitary requirements of young
23

24
25 _____
26 ¹ The Interim Report uses this term without defining it. This is not a term used by
27 Defendants, and so it is unclear whether the Interim Report is referring only to the
28 use of hotels as part of the Title 42 process, or whether it is referring to any
temporary custody incidental to the Title 42 process, or even to the Title 42 process
itself.

1 children.” Interim Report at 15. In reaching this opinion, the Interim Report makes
2 a brief reference to “a vast body of pediatric and psychological evidence
3 documenting sharp differences in the requisite custodial needs and developmental
4 vulnerabilities of children over [the age range between 10 and 17],” *id.*, but does
5 not specifically identify any of this evidence on which it relies or detail the specific
6 needs that the Monitor believes must be met to comply with the Agreement. It also
7 does not explain upon what evidence the Interim Report is relying for its apparent
8 conclusion that these needs are not being met during the brief period of temporary
9 custody in hotels. The Interim Report relies on some assumptions regarding facts
10 the Monitor has not yet obtained. *See id.* at 16 (“It remains unclear whether there
11 are any limits on the number of minors permitted to be housed in any given hotel.”);
12 *id.* (“It is not clear how the decisions regarding these cases were made[.]”). The
13 Interim Report also suggests that the Monitor has not spoken to any minors in
14 hotels.² *Id.* at 15.

15
16 The Interim Report concludes that:

17 While the amenities provided by the THP are appreciated, a list of
18 amenities is not a system of care for children of different ages and
19 developmental stages. There remains no assurance that the THP can
20 provide adequate custodial care for single minors, who by definition
21 are being moved through the immigration system alone and without
22 familial support or protection. Formal systems of custodial care for
23 children have been well defined and require specialized custodial
24 elements, continuous oversight, and specialized training of relevant
25 personnel.

26
27
28

² The Interim Report states that minors “have not yet been made available for interview.” *Id.* at 15. Defendants are not aware that the Monitor has made any request to interview minors.

1 *Id.* at 17. Based on this conclusion, the Interim Report recommends that, “the lower
2 age limit for single minors assigned to the THP should be formalized and raised
3 urgently from 9 to 14 years of age and alternative custodial programs for all single
4 minors should be pursued.” *Id.*

5 **III. OBJECTIONS**

- 6 a. The Interim Report Applies a Standard That Is Not Contained Within
7 the Four Corners of the Agreement, Nor Within Any of This Court’s
8 Orders.

9 The Monitor is charged with monitoring Defendants’ compliance with the
10 Agreement, as interpreted by certain orders of this Court. *See* Monitoring Order,
11 ¶ 2. “The Monitor shall have no authority to intervene in or direct Defendants’
12 activities.” *Id.* ¶ 4. The Interim Report is not consistent with the scope of the
13 Monitor’s duties because it reviews the use of hotels as part of the Title 42
14 process—a form of custody that Defendants maintain is not subject to terms of the
15 Agreement, *see* ECF No. 925 at 9-16—under a standard that is not found in the
16 Agreement or in any order of this Court interpreting the Agreement. Accordingly,
17 this Court should disregard the recommendations contained in the Interim Report.

18 The Interim Report does not address or take into account Defendants’
19 argument that the custody the report is addressing is not covered by the Agreement,
20 nor does it clearly explain whether or how the Monitor would conclude that the
21 Agreement applies to such custody. Further, the Interim Report fails to clearly
22 explain the standard by which it is analyzing Defendants’ use of hotels for briefly
23 housing minors pending their expulsion under Title 42, or how that standard relates
24 to the Agreement’s terms. The Interim Report makes two indirect references to the
25 term “safe and sanitary,” *id.* at 15, 17, but does not explain whether or how it is
26 applying this term. Instead, the Interim Report’s ultimate recommendation appears
27 to rest on a presumption that Defendants are required to have a “system of care”
28

1 for minors that may be understood by reference to “a vast body of pediatric and
2 psychological evidence documenting sharp differences in the requisite custodial
3 needs and developmental vulnerabilities of children over [the age range between
4 10 and 17].” *Id.* at 15. The Interim Report recommends a remedy, which
5 presumably must be based on a finding—not explicitly detailed in the Interim
6 Report—that the absence of such a “system of care” is a violation of the
7 Agreement. *Id.* at 17.
8

9 All of this is problematic for many reasons, not least of which because it
10 leaves Defendants with no way to understand the standard to which they are being
11 held, or the actions or inactions that have led to the Monitor’s apparent finding that
12 they have violated the Agreement. Details of the referenced “body of evidence” are
13 not cited or discussed in detail anywhere in the Interim Report, and there is no
14 explanation in the Interim Report regarding why the Monitor believes that this
15 “body of evidence” provides a specific standard for compliance, or what the
16 Monitor believes Defendants must do in order to comply with these uncited,
17 unidentified, and undiscussed standards. Notably, the Interim Report appears to
18 take issue with Defendants’ practices on the grounds that “it is not clear upon what
19 developmental or custodial grounds [Defendants’] age limit was based nor what
20 technical guidance was utilized to make the decision to exclude children aged 9 but
21 include those aged 10,” *id.* at 16, and finds that Defendants lack any formal age
22 limit policy, *id.*,³ while at the same time the Interim Report recommends the
23 imposition of an age limit of 14 for single minors without providing any
24 explanation of the “developmental or custodial grounds” on which this
25

26
27 ³ This finding also entirely fails to address the evidence in Defendants’ brief
28 regarding the considerations that may result in a minor being exempted from the
Title 42 process. *See* ECF No. 925 at 5-6.

1 recommendation is based. *Id.* at 17. Ultimately, it appears from the limited
2 information in the Interim Report that the referenced “system of care” is not a
3 substantive standard at all, but rather is a shorthand term used to describe a set of
4 substantive standards that the Interim Report does not detail, much less explain
5 how these standards derive from the Agreement’s terms.
6

7 There is no explanation in the Interim Report tying the presumed
8 requirement for a “system of care” to the “safe and sanitary” requirement of the
9 Agreement, or to any other terms in the Agreement, nor does the Interim Report
10 explain whether or why the Monitor has concluded that “safe and sanitary” was
11 intended by the parties in 1997 to be interpreted as a “system of care” for minors.
12 Nothing in the Interim Report ties the standard applied therein to any prior order
13 of this Court interpreting the Agreement—including, for example, the extensive
14 litigation over the meaning of the term “safe and sanitary” in the context of U.S.
15 Customs and Border Protection (“CBP”) facilities. *See* ECF No. 363 at 7-18. As
16 Defendants have shown, *see* ECF No. 925 at 20-25; ECF No. 925-1, brief housing
17 in a hotel, with hotel amenities and trained staff oversight, meets the “safe and
18 sanitary” standard that the parties and this Court have identified with regard to CBP
19 facilities. The Interim Report identifies no facts supporting a conclusion that the
20 care being provided to minors during this brief period is not safe and sanitary as
21 those terms are regularly understood, which is the standard that the parties
22 established in the Agreement.⁴
23

24
25 ⁴ Notably, Plaintiffs’ motion to enforce the Agreement also does not urge this
26 interpretation of the Agreement’s “safe and sanitary” requirement. Rather,
27 Plaintiffs’ motion is premised on the argument that Defendants have an obligation
28 under the Agreement “to provide children a safe, sanitary, and licensed placement

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
Essentially, the Interim Report recommends that this Court order significant restrictions on Defendants’ operations, presumably by finding Defendants in violation of a new standard for compliance with the Agreement that has never before been proposed, identified, or discussed by any party or the Court. At a minimum, the Court should decline to adopt the Interim Report’s recommendations that are based on this unsupported theory of the Agreement’s requirements unless and until Defendants are given notice sufficient to allow them to understand the “system of care” standard that is being applied to their conduct and how that standard derives from the Agreement, are provided an opportunity to review and confront the evidence supporting application of this standard, and are provided an opportunity to brief the question of whether the application of this standard is appropriate under the Agreement. Unless and until such procedures are completed, the Court should decline to adopt the recommendation contained in the Interim Report, and should decline to consider its recommendations in ruling on Plaintiffs’ pending motion to enforce the Agreement.⁵

17
18
19
20
21
22
23

for howsoever long they remain in federal custody.” ECF No. 920-1 at 6. To the extent that Plaintiffs adopt this interpretation for the first time in their reply briefing, ECF No. 960 at 20, the Court should disregard this argument. *See United States ex rel. Giles v. Sardie*, 191 F. Supp. 2d 1117, 1127 (C.D. Cal. 2000) (citing *Lujan v. National Wildlife Federation*, 497 U.S. 871, 894-95 (1990) (“It is improper for a moving party to introduce new facts or different legal arguments in the reply brief than those presented in the moving papers.”)).

24
25
26
27
28

⁵ Even if the Court determines that it is permissible to apply this new standard to Defendants, the Court should not adopt the Monitor’s recommendation to the extent that it could be read to place a restriction on the ability of the government to expel a minor pursuant to Title 42. Such a reading would exceed the scope of the Agreement’s terms. There is still nothing in the Agreement that could be read to

1 b. The Court Should Not Consider the Facts or Recommendations
2 Contained in the Interim Report Unless It Follows The Procedures
3 Required By The Monitoring Order and Fed. R. Civ. Pro. 53(f).

4 Defendants incorporate herein their objections to the First Interim Report
5 and reiterate those same objections regarding this Interim Report to the extent the
6 Monitor still has not adhered to the requirements of the Monitoring Order.
7 Specifically, regarding this Interim Report, the Monitor did not comply with the
8 requirement that “[p]rior to filing the Interim Report and Recommendation, the
9 Monitor shall afford the Parties a reasonable opportunity to be heard and to
10 expeditiously cure any violation.” Monitoring Order at 20. Notably, the Interim
11 Report proposes a standard for compliance with the “safe and sanitary” provision
12 of the Agreement that is purportedly based on “a vast body of pediatric and
13 psychological evidence” that has never been identified to Defendants, nor have
14 Defendants been provided the opportunity to address or respond to that evidence,
15 provide their own responsive evidence, or brief the question whether that evidence
16 reasonably requires the interpretation of the Agreement that the Interim Report
17 urges the Court to adopt. Both the Monitoring Order and Rule 53(f) (which is
18

19 _____
20
21 preclude the government from processing minors pursuant to Title 42 under any
22 circumstances, because the Agreement itself makes clear that it governs “the
23 detention, release, and treatment of minors” in custody pursuant to the immigration
24 laws. As Defendants explained in their response to Plaintiffs’ Motion to Enforce,
25 the Title 42 process is not an immigration process, and individuals in custody
26 pending their expulsion are not held in immigration custody. The Interim Report
27 provides absolutely no basis for reading the Agreement to govern the government’s
28 decisions regarding such processing. Thus, to the extent that the recommendation
 contained in the Interim Report might be read to urge the Court issue an order that
 would dictate how minors are processed, as opposed to the conditions in which
 they are held, it is recommending relief that is outside the scope of the Agreement’s
 terms.

1 incorporated in the Monitoring Order) would require that Defendants be provided
2 the opportunity to do all those things before the Court could consider whether to
3 adopt the factual representations or recommendation contained in the Interim
4 Report. The Court should provide the opportunity for Defendants to view and
5 respond to this evidence, and to provide briefing on the recommendations
6 contained within the Interim Report, before it considers them in conjunction with
7 Plaintiffs' pending motion to enforce the Agreement regarding Title 42.

8 **IV. CONCLUSION**

9 For all of the above reasons, Defendants ask the Court to disregard the
10 Interim Report or, if the Court intends to consider or adopt any portion of the
11 Interim Report in ruling on Plaintiffs' pending motion (ECF No. 920), to follow
12 the procedures required by the Monitoring Order and Federal Rule of Civil
13 Procedure 53(f) before doing so.
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 DATED: September 2, 2020 Respectfully submitted,

2
3 ETHAN P. DAVIS
Acting Assistant Attorney General

4
5 AUGUST E. FLENTJE
Special Counsel to the Assistant Attorney
6 General

7
8 WILLIAM C. PEACHEY
Director, District Court Section
9 Office of Immigration Litigation

10
11 WILLIAM C. SILVIS
Assistant Director, District Court Section
12 Office of Immigration Litigation

13 /s/ Sarah B. Fabian

14 SARAH B. FABIAN
15 NICOLE N. MURLEY
Senior Litigation Counsel
16 Office of Immigration Litigation
District Court Section
17 P.O. Box 868, Ben Franklin Station
18 Washington, D.C. 20044
19 Tel: (202) 532-4824
20 Fax: (202) 305-7000
Email: sarah.b.fabian@usdoj.gov

21 *Attorneys for Defendants*

CERTIFICATE OF SERVICE

I hereby certify that on September 2, 2020, I served the foregoing pleading and attachments on all counsel of record by means of the District Clerk's CM/ECF electronic filing system.

/s/ Sarah B. Fabian
SARAH B. FABIAN
U.S. Department of Justice
District Court Section
Office of Immigration Litigation

Attorney for Defendants

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28